Supreme Court, U. S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1977
NO. 77-1205

COMMONWEALTH OF PENNSYLVANIA,
PETITIONER

v.

THEODORE MOODY,
RESPONDENT

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

NO ARGUMENT ADVANCED BY RESPONDENT MILITATES AGAINST THE ISSUANCE OF A WRIT OF CERTIORARI TO REVIEW THE DECISION BELOW.

Respondent's answer to the petition filed in this case not only evidences a total misconception as to the thrust of that petition but also relies upon a panoply of erroneous facts and conclusions. In seeking to dissuade this Court from granting the review requested, respondent first suggests that neither of the issues framed in the petition are fairly presented by the record in question. This assertion is insupportable. In part, he argues that no constitutional issue exists because this Court is bound by the state court's determination that the Pennsylvania statute[1] is invalid by reason of its restriction of the relevant mitigating circumstances to the defendant's status or situation AT THE TIME OF THE KILLING. By that argument, respondent effectively acknowledges the very constitutional issue upon which review is sought. Thus, his suggestion that the first issue framed by petitioner is without record basis is entirely frivolous.

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[1] 18 Pa.C.S.A. §1311(d)(2)(i).

Similarly devoid of merit is respondent's assertion that this case is an inappropriate vehicle for considering whether an otherwise unduly restrictive mitigating circumstances provision may nevertheless be constitutionally valid when applied to a defendant already serving a life sentence at the time of the commission of the relevant offense. In arguing that this issue is not presented, simply because §1311 does not make death mandatory in this circumstance, respondent has misconstrued the real import of the question which is presented. Within the context of this case, it is irrelevant that, under the Pennsylvania scheme, the death penalty is not mandatory when applied to a life prisoner. Rather, since this defendant was serving seven life sentences at the time of the commission of the relevant offense, the issue is simply whether the adequacy of the Pennsylvania mitigating circumstances provision may be reviewed under substantially different standards than those utilized in cases which did not involve prisoners serving life sentences. The fact that this respondent was, in fact, serving seven life sentences is sufficient to raise that limited question.[2]

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[2] For this purpose, respondent's reliance upon (1) the fact that he was not serving a Pennsylvania life sentence at the time of the killing and (2) the fact that the convictions for the seven (7) life sentences were still on appeal is entirely misplaced. As was noted in the Commonwealth's original petition, the ninth aggravating circumstance contained in the Pennsylvania Death Penalty Statute is that:

(Footnote continued on next page.)

NEXT, RESPONDENT SUGGESTS THAT THE PENDENCY OF NEW PENNSYLVANIA LEGISLATION, WHICH WOULD RESTORE THE DEATH PENALTY AND COMPLY WITH THE STATE SUPREME COURT'S DECISION IN THIS CASE, IS A FACTOR WHICH MILITATES AGAINST THE ISSUANCE OF A WRIT OF CERTIORARI.[3] THIS CONTENTION IS ALSO

FOOTNOTE 2 CONTINUED

> THE DEFENDANT HAS BEEN CONVICTED OF ANOTHER FEDERAL OR STATE OFFENSE, COMMITTED EITHER BEFORE OR AT THE TIME OF THE OFFENSE AT ISSUE, FOR WHICH A SENTENCE OF LIFE IMPRISONMENT OR DEATH WAS IMPOSABLE OR THE DEFENDANT WAS UNDERGOING A SENTENCE OF LIFE IMPRISONMENT FOR ANY REASON AT THE TIME OF THE COMMISSION OF THE OFFENSE.

18 PA.C.S.A. §1311(D)(IX) (SUPP. 1977-1978) (EMPHASIS ADDED). THUS, ON ITS FACE, THIS STATUTE DEEMS IRRELEVANT THE APPELLATE STATUS AND LOCALE OF THE PRIOR CRIMES AT ISSUE. FOR THE SAME REASON, IT IS IMMATERIAL THAT THE SENTENCES IMPOSED UPON RESPONDENT WERE EACH TWENTY YEARS TO LIFE IMPRISONMENT. THE POINT IS THAT A LIFE SENTENCE WAS IMPOSABLE FOR EACH OF THE SEVEN SEPARATE MURDERS FOR WHICH RESPONDENT STOOD CONVICTED.

3 RESPONDENT REPRESENTS, AT PAGES 5-6 OF HIS BRIEF, THAT SENATE BILL NO. 1233, AMENDING THE PRESENT STATUTE, WAS PASSED BY THE LEGISLATURE AND SENT TO THE GOVERNOR AS OF APRIL 19, 1978. THIS IS A SERIOUS MISSTATEMENT; NO AMENDMENTS TO THE DEATH PENALTY STATUTE HAVE BEEN PASSED BY THE PENNSYLVANIA LEGISLATURE OR SENT TO THE GOVERNOR. SENATE BILL NO. 1233 WAS, IN FACT, PASSED BY THE SENATE ON FEBRUARY 27, 1978, AND THEN SENT TO THE HOUSE OF REPRESENTATIVES WHERE, ON MARCH 13, 1978, IT WAS REFERRED TO THE JUDICIARY COMMITTEE. WHILE IN THAT COMMITTEE, THE BILL WAS COMPLETELY "GUTTED." THUS, THE VERSION SUBSEQUENTLY PASSED BY THE HOUSE ON APRIL 18, 1978, DIFFERED SUBSTANTIALLY FROM THE PRIOR SENATE VERSION. IT HAS NOW BEEN RETURNED TO THE SENATE FOR CONCURRENCE IN THE HOUSE AMENDMENTS; HOWEVER, NO ACTION WILL BE TAKEN THEREON AT LEAST UNTIL MAY 22, 1978, WHEN THE LEGISLATURE RECONVENES FOLLOWING ITS CURRENT RECESS.

WITHOUT MERIT. AS RESPONDENT HIMSELF ADMITS, EVEN THE EXISTENCE OF SUCH NEW LEGISLATION WOULD NOT MOOT THE ISSUE PRESENTED BY THIS CASE. INDEED, REGARDLESS OF ITS MORE BROAD-BASED RAMIFICATIONS, THE MOODY DECISION ITSELF AFFECTS NOT ONLY RESPONDENT'S SENTENCE BUT ALSO APPROXIMATELY TWENTY (20) OTHER DEATH PENALTY SENTENCES WHICH WERE IMPOSED IN PENNSYLVANIA UNDER THE DEATH PENALTY STATUTE HERE AT ISSUE. THIS, IN AND OF ITSELF, IS OF SUFFICIENT IMPORTANCE TO JUSTIFY REVIEW BY THIS COURT, ESPECIALLY WHERE THIS COURT'S RECENT DEATH PENALTY DECISIONS WERE THE VERY BASIS FOR DECLARING THOSE SENTENCES CONSTITUTIONALLY INVALID.

MOREOVER, THE FACT THAT VARIOUS PROPOSALS TO MODIFY THE CURRENT STATUTE -- ONE OF WHICH WAS, IN FACT, INITIALLY DRAFTED BY THE PHILADELPHIA DISTRICT ATTORNEY'S OFFICE -- HAVE BEEN INTRODUCED IN THE LEGISLATURE IN NO WAY LESSENS THE URGENCY AND NECESSITY FOR THIS COURT TO REVIEW THAT STATUTE. THE PENDENCY OF CURATIVE LEGISLATION ONLY INDICATES THE LEGISLATURE'S CLEAR DESIRE TO HAVE AN ENFORCEABLE DEATH PENALTY IN FORCE IN PENNSYLVANIA AS SOON AS POSSIBLE SINCE NONE PRESENTLY EXISTS. IF THE LEGISLATURE WERE TO WAIT UNTIL THIS LITIGATION IS CONCLUDED BEFORE INITIATING NEW LEGISLATION, PENNSYLVANIA WOULD BE WITHOUT A DEATH PENALTY FOR AN UNNECESSARILY EXTENDED PERIOD OF TIME. INSTEAD, THE LEGISLATURE HAS RESPONDED TO THE PRESENT SITUATION BY PURSUING ALL AVENUES TO INSURE, REGARDLESS OF THE OUTCOME OF THE MOODY LITIGATION, THAT PENNSYLVANIA WILL BE WITHOUT

A DEATH PENALTY FOR THE SHORTEST POSSIBLE TIME. SHOULD THE COMMONWEALTH PREVAIL BEFORE THIS COURT, AND THE LEGISLATURE ALSO PASS A NEW DEATH PENALTY STATUTE, IT IS CLEARLY WITHIN THE LEGISLATURE'S PREROGATIVE TO THEN RE-AMEND THAT STATUTE IN CONFORMITY WITH THIS COURT'S MANDATE. THE REAL POINT IS THAT AN IMPORTANT PENNSYLVANIA LAW SHOULD NOT BE STRUCK DOWN BASED UPON A STATE COURT'S ERRONEOUS INTERPRETATION OF FEDERAL LAW WITH NO RECOURSE BEFORE THE ULTIMATE ARBITER OF THE UNITED STATES CONSTITUTION.

MOREOVER, WHERE AN ISSUE AS IMPORTANT AS THE DEATH PENALTY IS INVOLVED, THE FACT THAT ONLY THE LAW OF ONE STATE MAY BE AFFECTED SHOULD NOT REQUIRE THIS COURT TO DECLINE REVIEW. CERTAINLY, THIS COURT HAS, TO DATE, EXTENSIVELY REVIEWED MANY DEATH PENALTY STATUTES AND HAS INDICATED THAT EACH SCHEME MUST BE REVIEWED ON A STATUTE-BY-STATUTE BASIS. Gregg v. Georgia, 428 U.S. 153, 195, 96 S.Ct. 2909, 2935-2936 (1976). THIS IS NO LESS TRUE WHERE, AS HERE, THE STATE SEEKS REVIEW THAN IT IS IN CASES WHERE AN INDIVIDUAL DEFENDANT IS PETITIONING FOR THAT REVIEW.

FINALLY, RESPONDENT SUGGESTS THAT REVIEW SHOULD HERE BE DENIED BECAUSE THE JUDGMENT RENDERED BY THE PENNSYLVANIA SUPREME COURT, PURSUANT TO AN INTERLOCUTORY APPEAL, IS NOT A FINAL JUDGMENT FOR THE PURPOSES OF 28 U.S.C.A. §1257. IN SUPPORT OF THIS CONTENTION, HE ACKNOWLEDGES THAT Cox Broadcasting Corporation v. Cohn, 420 U.S. 469, 95 S.Ct. 1029 (1975), DELINEATES FOUR CATEGORIES OF CASES WHERE REVIEW

BY THIS COURT IS PROPER, DESPITE THE NECESSITY FOR FURTHER STATE COURT PROCEEDINGS. HE ARGUES, HOWEVER, THAT THIS CASE IS NOT WITHIN THE PURVIEW OF ANY OF THOSE CATEGORIES.

THIS LAST ASSERTION BY RESPONDENT IS FLATLY ERRONEOUS. IN Cox, SUPRA AT 482, 95 S.CT. AT 1039, THIS COURT CLEARLY STATED THAT FINALITY EXISTS, FOR §1257 PURPOSES, WHERE THE FEDERAL CLAIM HAS BEEN FINALLY DECIDED AND CANNOT BE LATER REVIEWED, WHATEVER THE ULTIMATE OUTCOME OF THE CASE.[4] THIS CASE UNQUESTIONABLY FALLS SQUARELY WITHIN THAT CATEGORY. THE DEATH PENALTY HERE AT ISSUE WAS VOIDED BY A LOWER COURT PRIOR TO THE FORMAL IMPOSITION OF SENTENCE. AT THE SAME TIME, DEFENDANT'S REQUEST FOR A NEW TRIAL WAS DENIED. A CERTIFIED INTERLOCUTORY APPEAL WAS THEN REQUESTED BY THE COMMONWEALTH AND ALLOWED BY THE PENNSYLVANIA SUPREME COURT, BECAUSE OF THE STRONG POSSIBILITY, UNDER PENNSYLVANIA LAW, THAT THE RE-IMPOSITION OF THE DEATH PENALTY WOULD

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4 SPECIFICALLY, THIS COURT STATED THAT IT WOULD TREAT AS FINAL JUDGMENTS, FOR §1257 PURPOSES, THOSE CASES WHERE:

> THE FEDERAL CLAIM HAS BEEN FINALLY DECIDED, WITH FURTHER PROCEEDINGS ON THE MERITS IN THE STATE COURTS TO COME, BUT IN WHICH LATER REVIEW OF THE FEDERAL ISSUE CANNOT BE HAD, WHATEVER THE ULTIMATE OUTCOME OF THE CASE. THUS, IN THESE CASES, IF THE PARTY SEEKING INTERIM REVIEW ULTIMATELY PREVAILS ON THE MERITS, THE FEDERAL ISSUE WILL BE MOOTED; IF HE WERE TO LOSE ON THE MERITS, HOWEVER, THE GOVERNING STATE LAW WOULD NOT PERMIT HIM AGAIN TO PRESENT HIS FEDERAL CLAIMS FOR REVIEW. THE COURT HAS TAKEN JURISDICTION IN THESE CIRCUMSTANCES PRIOR TO COMPLETION OF THE CASE IN THE STATE COURTS.

Cox Broadcasting Corporation v. Cohn, supra, AT 1039.

BE BARRED AFTER A LIFE SENTENCE WAS FORMALLY IMPOSED ON THIS RESPONDENT. IN A LETTER, FILED WITH THE PENNSYLVANIA SUPREME COURT, SUPPLEMENTING THE COMMONWEALTH'S PETITION TO THAT COURT, SEEKING INTERLOCUTORY REVIEW OF THE DEATH PENALTY QUESTION, THE COMMONWEALTH INDICATED:

> THE COMMONWEALTH IS REQUESTING PRE-SENTENCE REVIEW OF THE CONSTITUTIONALITY OF THE DEATH PENALTY TO AVOID LITIGATION OF A POTENTIALLY TROUBLESOME ISSUE. SPECIFICALLY, WE ARE CONCERNED THAT WERE THIS CASE TO BE REVIEWED IN THE ORDINARY COURSE OF APPEAL FROM A JUDGMENT OF SENTENCE, THE DEFENSE WOULD CLAIM THAT THE DEATH PENALTY ISSUE IS MOOT. THE DEFENDANT, COULD CLAIM THAT HAVING BEEN SENTENCED TO LIFE IMPRISONMENT, HE COULD NOT SUBSEQUENTLY BE SENTENCED TO DEATH, EVEN IF THIS COURT OVERTURNED THE LOWER COURT RULING THAT THE DEATH PENALTY IS UNCONSTITUTIONAL. COMMONWEALTH V. SILVERMAN, 442 PA. 211 (1971); COMMONWEALTH V. MARKS, 442 PA. 208 (1971) AND COMMONWEALTH V. WRONA, 442 PA. 201 (1971) MIGHT SUPPORT SUCH A CLAIM. IN SILVERMAN, THIS COURT STATED "... THAT THERE IS NO DOUBT IN OUR MINDS THAT IF THE ISSUE IS EVER RAISED, THE UNITED STATES SUPREME COURT WILL RULE THAT THE MODIFICATION OF A SENTENCE IMPOSED ON A CRIMINAL DEFENDANT WHICH INCREASES THE PUNISHMENT IS DOUBLE JEOPARDY, AND WE NOW SO RULE." 442 PA. AT 217.

THE PENNSYLVANIA SUPREME COURT THEREAFTER GRANTED THE PETITION TO ALLOW AN INTERLOCUTORY APPEAL. THUS, THE ONLY REASON THE DEATH PENALTY QUESTION WAS PRESENTED IN THAT POSTURE WAS BECAUSE THE QUESTION, HAVING ARISEN FROM A TRIAL COURT ORDER DECLARING THE DEATH PENALTY UNCONSTITUTIONAL, MIGHT NOT SURVIVE THE IMPOSITION OF A LIFE SENTENCE. FINALITY WAS THE VERY REASON INTERLOCUTORY REVIEW WAS REQUESTED AND GRANTED IN THE FIRST INSTANCE. THUS, THE QUESTION IS CLEARLY REVIEWABLE AS A "FINAL ORDER" UNDER THE HOLDINGS OF THIS COURT.

CONCLUSION

FOR THESE ADDITIONAL REASONS, PETITIONER, THE COMMONWEALTH OF PENNSYLVANIA, RESPECTFULLY REQUESTS THAT A WRIT OF CERTIORARI ISSUE TO REVIEW THE DECISION BELOW.

RESPECTFULLY SUBMITTED,

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IN THE SUPREME COURT OF THE UNITED STATES

COMMONWEALTH OF PENNSYLVANIA : OCTOBER TERM, 1977
PETITIONER

V. :

THEODORE MOODY : NO. 1205
RESPONDENT

CERTIFICATION OF SERVICE

I, STEVEN H. GOLDBLATT, ESQUIRE, COUNSEL FOR PETITIONER, COMMONWEALTH OF PENNSYLVANIA, HEREBY CERTIFY THAT I HAVE CAUSED THIS REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO BE SERVED UPON JOHN ROGERS CARROLL, ESQUIRE, AND JOSEPH D. MONTGOMERY, III, ESQUIRE, COUNSEL FOR RESPONDENT, THEODORE MOODY, BY DEPOSITING THREE COPIES IN THE UNITED STATES MAIL, FIRST CLASS, POSTAGE PREPAID, ADDRESSED TO JOHN ROGERS CARROLL, ESQUIRE, 326 THREE PENN CENTER, PHILADELPHIA, PENNSYLVANIA, 19102, AND THREE COPIES IN THE UNITED STATES MAIL, FIRST CLASS, POSTAGE PREPAID, ADDRESSED TO JOSEPH D. MONTGOMERY, III, ESQUIRE, 2700 LEWIS TOWER BUILDING, FIFTEENTH AND LOCUST STREETS, PHILADELPHIA, PENNSYLVANIA, 19102, ON THURSDAY, MAY 4, 1978.

STEVEN H. GOLDBLATT